No. 14,877

IN THE

United States Court of Appeals

For the Ninth Circuit

HAROLD D. PADDOCK,
Appellant,

vs.

FLORENCE PADDOCK,
Appellee.

On Appeal from the District Court for the District of Alaska, Third Division.

REPLY BRIEF OF APPELLANT.

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I.

Because of the new matters raised and the distorted interpretations of the facts in the record by Appellee, Appellant feels constrained to file this reply to the Brief of the Appellee.

II.

STATEMENT AS TO PLEADINGS AND PROCEEDINGS AND FACTS.

On page six of Appellee's Brief, reference is made to Exhibit I and Exhibit II, in referring to appraisals

of the business of the Defendant. No citation was given for the Exhibits, which do not appear to be in the record, and, therefore, it is not possible to determine whether or not an appraisal of Seventy Thousand ($70,000.00) was made by Gene Silberer, as alleged in Appellee's Brief, nor is it possible to determine whether a Fifty Nine Thousand Three Hundred Fifty Dollars ($59,350.00) appraisal was made by the City, also as alleged. In fact, the only reference to the record on this matter, namely page 43 on the record, indicates that the fair value of the property was Fifty Five Thousand, in the accounting that was accepted by the Court. Mr. George R. Jones, in his statement to the Court stated at (TR 43)

> "We were, however, unable to mutually agree upon the value of the Real Estate described and accordingly called in Mr. Renfro and a fair value of $55,000.00 was accepted by all concerned."

The appraisal of Fifty Five Thousand ($55,000.00) appears to be fair and was agreed to by the third party called in, namely Mr. Renfro, a Vice-President of the First National Bank of Anchorage. In any event the figure of Fifty Five Thousand ($55,000.00) seems to be accepted by all parties as the value of the property, but on pages twenty-one and twenty-two of Appellee's Brief, there is an attempt to infer that the Appellant got the advantage of Fifteen Thousand Dollars ($15,000.00) because of the alleged difference between the Fifty Five Thousand ($55,000.00) and some appraisal in the amount of Seventy Thousand Dollars ($70,000.00). The alleged appraisal of Sev-

enty Thousand Dollars ($70,000.00) does not appear in the record and it does not appear anywhere in the record that Appellant obtained any Fifteen Thousand Dollars ($15,000.00) advantage in the computations by the Court.

III.

QUESTIONS FOR DETERMINATION.

Under this section of Appellee's Brief, on page nine, it is stated that the Appellant claims that the business and the property all belong to him as an individual, and that he is entitled upon dissolution of the marriage to all of the property acquired both before and after the marriage. This statement is categorically untrue. Nowhere in the record does the Appellant even suggest that he is entitled to all of the property, but has insisted at all times upon an equitable distribution of the property, which would allow the Appellant the property that he had at the time that he married Appellee.

The Appellee, on page nine and ten of Appellee's Brief, infers that only four questions need be determined. However, there are ten sections to Appellant's Brief (A to J) which are still before this Court for determination.

IV.

SUMMARY OF ARGUMENT.

At page eleven of Appellee's Brief, it is stated that the claim of Appellant that the Court decided this case

on the theory of partnership is not sustained by the evidence. This statement is incredible in view of the statements of the Court concerning the parties of this action wherein the Court felt that they were partners. See Appellant's Brief, pages 14-15 and in particular the Court's discussion on page 104 of the record.

Further on in this same section, the Appellee, in referring to the Appellant, states:

> "He charged everything conceivable against the drawing account of Appellee but charged only a nominal amount against his own drawing account."

The inference to be drawn from this is false for the reason that there is nothing in the record that shows that the appellant made any such preferential charges. There is no showing that all proper charges were not properly charged to the two different accounts and taken into consideration by the appraisers and accountants.

At page 12 of the Brief, the Appellee further infers that Appellant was actually getting his living out of the business and that it was costing him nothing. Such a statement is unsupported by the record. In fact, the record will show that Appellant was living on approximately One Hundred Dollars ($100.00) a month after he had been forced to leave his own home, during the same period of time in which Appellant actually drew something over Sixteen Thousand Dollars ($16,000.00). See Appellee's Brief page 37. The figures involved herein can indicate only one thing, namely that Appellee was extravagant. Counsel for

Appellee indicated that the business of the Appellants was making roughly Twenty Five or Twenty Six Thousand Dollars per year, which apparently would be the gross earnings of the business. However, the Appellee saw fit to spend approximately Sixteen Thousand Dollars ($16,000.00) in one year.

Further on in this same section the Appellee refers to Five Hundred Dollars ($500.00) per month of temporary support money. This amount, however, would only amount to the rate of Six Thousand Dollars ($6,000.00) per year which is considerably less than Sixteen Thousand ($16,000.00) drawn by Appellee in 1953. This temporary support should also be considered in viewing the Appellee's objection to the Appellant having control of the business. It hardly seems reasonable to expect the Appellant to pay Five Hundred Dollars ($500.00) temporary support money unless he did have control of the business, although the Appellee has raised this issue many times.

V.

ARGUMENT.

Again, at page 15 of Appellee's Brief, it is stated that Appellee made no claim that the business was in fact a technical partnership. This is another incredible statement in view of the statement by Appellee's attorney (page 67 of the record), that the parties had conducted that business as a partnership for many years. It does not appear anywhere in the record that the

Appellee changed this statement or modified it in any way, so the foregoing statement of Appellee's Brief is clearly not true.

On page 16, the Appellee again states that Appellant claimed all the property and that his wife had no interest in it. This statement on its face is false, since the evidence was uncontroverted that the Appellee had one house and lot in her name, which had been acquired during the marriage of the parties (TR 85). The inference to be gathered from this statement of Appellee's Brief is also in error, since it is inferred that Appellant wants all the property without allowing the wife anything. The Appellant has never, at any time, ever put forth such a claim, nor does it appear in the record. The inference is preposterous, since all that the Appellant wishes is an equitable and just division of the property acquired after the marriage.

At page 17 of the Appellee's Brief it is stated that there was never any finding by the Court, oral or otherwise, that there was a partnership. There may not have been a written finding by the Court, but the oral statement of the Court at the bottom of page 103 of the record clearly makes the foregoing statement false. This point was further discussed at page 22 of the Appellee's Brief, where the Appellee stated that the Court indicated that it did not consider such question as being of any importance in reference to the question of partnership. In view of the Court's statement at page 103 and 104, the Appellee's statement is contrary to the record.

Another distortion of the facts and of the record occurs at page 23 of Appellee's Brief wherein it is stated:

> "In a cross-examination when Defendant was asked to break down the claimed net worth of his business at the time of the marriage, he came up with the total figure of approximately $4,000.00."

The citation is to page 148 of the record, but the statement is completely unsupported by the reference. Page 148 of the record shows that the Appellant had an automobile worth approximately Two Thousand Dollars ($2,000.00) and paint brushes worth between One and Two Thousand Dollars. No other testimony was brought out concerning the value of the real property, cash on hand, accounts receivable, and other assets that may have been owned by Appellant or in Appellant's business at that time.

From that same page 23 of Appellee's Brief, the Appellee attempts to cast the Appellant in a poor light by claiming that he refused to produce books. The inference is again misleading for the reason that the only reference to the books was the one indirect request for the books made at page 149 of the record as follows:

> "Q. All right. I wish that you would get out, please, the books that you kept during the years 1937, '38 through 1940 so we (97) can give them to Mr. Godchaux . . ."

This indirect request was never pursued further. No purpose for such a request is apparent since the record shows that Mr. Godchaux kept the books for

the Appellant (TR 150) and Mr. Godchaux was also appointed the master in this case (TR 72). If the information was desired, it obviously could have been received from the master. The fact that it was available undoubtedly accounts for the failure of the Appellee to pursue this particular question further.

On page 24 of the Appellee's Brief, it is stated that Mr. Paddock owned no real property at the time of the marriage. This is again misleading for the reason that the Appellant was buying the property where the store was located at the time of the marriage, although it may not have been completely paid off (TR 126). Appellant may not have had the legal title to the property at this time, but he at least owned an equitable interest by virtue of a real estate contract. The Appellee seems to make quite a point out of the fact that the title to the property was not acquired until after the marriage, but such an argument is purely technical and not based upon justice and practicalities whatsoever.

The Appellee has strenuously attempted to show that the Appellant was worth little or nothing at the time that she married him, and such twisting and distortion of the facts has been attempted in order to attempt to make such a showing. However, the true facts remain, that practically all of the value of the business of the Appellant was due to the efforts of the Appellant and his investments made prior to the marriage. The evidence shows that the Appellant joined in a partnership in 1932 with Edward T. McNally in a paint contracting business (TR 125). This

partnership later on opened up a Dutch Boy Agency for Dutch Boy Paints and also installed a stock of paints and wallpaper. The Appellant eventually bought out Mr. McNally's half (TR 148) and then some time after the marriage, the Appellant also bought out his former partner's buildings where the Paddock Paint and Furniture Store is now in business. The results are all the natural results of a partnership formed by the Appellant in 1932, which are now claimed by the Appellee to be due to her efforts.

On page 25 of the Appellee's Brief, Appellee states:

> "There isn't any evidence at all that the Court in making the division didn't take into consideration any increase in the value of any property owned by Appellant at the time of marriage."

This statement is false on the face of the record. In finding of fact No. V, the Court found:

> "That prior to the marriage of the parties, the Defendant, Harold D. Paddock was operating a certain business and had an investment at that time in such business in the amount of Ten Thousand Dollars ($10,000.00)." (TR 25.)

Then on page 33 of the record, in the decree, the Court allowed the Defendant, Appellant herein, "the sum of Ten Thousand Dollars ($10,000.00) invested by the Defendant in the business known as Paddock Paint Store prior to the marriage of the parties." The record therefore shows that the Court found that the Appellant had invested Ten Thousand Dollars ($10,000.00) in his business, but in the decree the Court allowed him exactly Ten Thousand Dollars

($10,000.00) for said investment, even though that was the sum invested prior to the time of the marriage of the parties in 1938.

The Appellee has quoted part of section 1128 of Barron and Holtzoff, Federal Practice and Procedure, covering only the last paragraph. However, section 1128 of this authority starts out:

> "Under Rule 52 as amended, 'If an opinion or memorandum of decision is filed, it will be sufficient if the Findings of Fact and Conclusions of Law appear therein'."

Thus we have a filed memorandum opinion in this case, wherein the Court did make its Findings and Conclusions of Law. The formal Findings of Fact and Conclusions of Law were filed approximately two and half months later, namely on December 22, 1954, while the opinion had been filed on October 8, 1954. The Appellee has stated that the opinion does not purport to be Findings of Fact and Conclusions of Law, but a check of the memorandum opinion will show that the Judge had started seven paragraphs off with "I find" or "I further find" (TR 18-22).

It is also stated by the Appellee on page 28 of Appellee's Brief that it is debatable as to whether there was any inconsistency at all between the opinion of the Court and Findings of Fact. Such a statement seems irreconcilable with the report of the auditor (TR 52-54).

At page 29 of Appellee's Brief, the Appellee submits the proposition that the Appellant has a burden

of presenting a proper record to the Court of Appeals, showing that the evidence compelled findings in his favor. However, nothing is shown as to why the Appellant's record would be inadequate, or improper, and the Appellee supports this proposition with *Jernigan v. Southern Pacific Company,* C.A. 9, 1955, 222 Fed. (2d) 245; *McClyman v. Hamilton,* C.A. 9, 1950, 180 Fed. (2d) 965. Neither of these cases are in point, with the *Jernigan* case merely standing for the proposition that the trial court can correct clerical errors, while the *McClyman* case concerns the bankruptcy of a partnership.

At page 35 of Appellee's Brief, the Appellee has supported the proposition that the Appellee must be given the benefit of all favorable inferences which may reasonably be drawn from the evidence by *Lassiter v. Guy F. Atkinson Co.,* C.A. 9, 1949, 176 Fed. (2d) 984. However, this case also stands for the following proposition which is quoted from page 993 of the opinion.

> "If, on the entire evidence, we are 'left with the definite and firm conviction that a mistake has been committed', it is our duty to reverse the findings . . ."

The quotation also refers to *United States v. U. S. Gypsum Co.,* 333 U.S. 364, 395, in support of the foregoing proposition.

The Appellee has also referred to *Pacific Portland Cement Co. v. Food Machinery and Chemical Corporation,* C.A. 9, 1950, 178 Fed. (2d) 541, but this case, too, also stands for propositions other than that

set forth by the Appellee, as indicated in the opinion at page 548 as follows:

> "As a corollary to this rule, we may make our own inferences from undisputed facts or purely documentary evidence. For, to use the colorful language of the Court of Appeals for the Third Circuit, the rule does not operate 'to entrench with like finality the inferences of conclusions drawn by the trial court from its fact findings' ".

At page 36 of Appellee's Brief it is stated:

> "In the first place, this divorce was not granted to the husband because of the fault of the wife. The divorce was granted to the wife because of the fault of the husband."

The record does not seem to show that the Defendant was clearly at fault in the matter of the divorce and the proof that was put on by the Appellee merely went to show incompatibility. The attorney for the Appellee stated at page 66 of the transcript "but I intend in this matter to put on proof of a general nature which I believe will establish incompatibility between the parties." It is true that the Appellee did put on this showing of incompatibility (TR 77-79) but it does not clearly appear that the Appellant was the party at fault.

The same point is referred to at page 40 of Appellee's Brief, wherein Appellee states that the 26 *Am. Jur.* 939 citation is not applicable because the Appellee states that the "evidence is undisputed that the parties separated by reason of the fault of the husband." This statement is baldly false for the reason that the state-

ment is not only disputed but for the further reason that there is no evidence to support such a statement. The rule as quoted in 26 *Am. Jur.* page 939 and in Appellant's Brief at page 35-36, is applicable and had the Appellant been able to open up the case he would have been able to apply this rule to this particular case.

VI.

In conclusion, we can only repeat that the Appellee should be entitled, at most, to a reasonable part of the value of the property accumulated by Appellant and Appellee after marriage, there being no children born of said marriage. To reach such a determation, Appellant should be entitled to the present value of his premarriage investment and its accumulations and enhancements in value with the remainder at the very most being divided equally between Appellant and Appellee, and even this is much more than Appellee is entitled to even if the Judgment granting her a divorce should be upheld.

Dated, Anchorage, Alaska,
August 16, 1956.

Respectfully submitted,
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Attorneys for Appellant.